IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *ex rel.* W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, *et al.*	)	
Plaintiffs	)	
vs.	)	05-CV-00329-GKF-SAJ
TYSON FOODS, INC., *et al.*	)	
Defendants	)	

CAL-MAINE FOODS, INC.'S REPLY IN SUPPORT OF ITS
MOTION TO COMPEL DISCOVERY RESPONSES FROM THE PLAINTIFF

Fed.R.Civ.P. 26(b)(1) provides, in pertinent part, that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . ." (emphasis added) The plaintiff's response to this motion to compel is nothing more than a restatement by the plaintiff that it refuses to produce discovery responses which are relevant to defenses raised by Cal-Maine and other defendants. The plaintiff unabashedly asserts the proposition that it does not have to respond to any discovery which it does not consider to be relevant solely to its claims.

The plaintiff argues that "Cal-Maine's frustration with [the discovery responses] stems from its attempt to force the State to prove its case in a manner that Defendant Cal-Maine wants, as opposed to the manner in which the State intends (and is allowed under the law)." (pltf's Response at p. 4) That is not correct. Cal-Maine's frustration is that the plaintiff simply will not cooperate in elementary discovery which is plainly relevant to the defenses asserted by Cal-Maine. If the plaintiff truly believes the defenses are without merit,

it should ask Judge Frizzell to strike the defenses. In the meantime, it should be compelled to follow the Rules of Civil Procedure and cooperate in discovery related to the defenses asserted by Cal-Maine.

Interrogatories 1 and 2, and Production Requests 1 and 2

As pointed out in the motion, Cal-Maine asserted in its Answer to the First Amended Complaint (and now in its Answer to the Second Amended Complaint) the defense that manure from Cal-Maine chickens was stored and applied in a lawful manner, i.e., the manure was stored and applied in conformance with applicable Oklahoma and Arkansas law. At the proper time, Cal-Maine will argue the defense in a dispositive motion. Whether or not the defense will act as a complete bar to all nine counts in the Second Amended Complaint remains to be seen, but it is clearly not a frivolous defense and the plaintiff does not argue that it is. The validity of the defense is not, of course, an issue to be decided by His Honor in the present motion.

The plaintiff merely argues that the defense, and the discovery related to the defense, do not conform to its evolving theory of liability in this case. Cal-Maine is rightly dubious about the plaintiff's theories of liability, but Cal-Maine has nonetheless cooperated in responding to discovery propounded by the plaintiff relating to those theories. Cal-Maine is entitled to conduct discovery relating to its asserted defenses whether or not those defenses take the same view of the case adopted by the plaintiff. The plaintiff's arguments in its motion response are largely misplaced and meaningless in the context of this discovery dispute.

Some aspects of the plaintiff's responses to these discovery requests and this motion are less than clear. The plaintiff is obviously hedging its position. The general direction of the plaintiff's response is that the discovery is not relevant because "the State's contentions

are directed at the Poultry Integrator Defendants" rather than at the contract growers. (Pltf's Response, p. 3) It then argues, on page 6 of its Response, that its case " . . . will be proven, in part, circumstantially . . ." (emphasis added) On page 4 of its Response the plaintiff states that it can prove its case without "directly documenting each individual statutory violation." (emphasis added) On page 5 of the Response the plaintiff states that it may "rely on direct evidence of the release of waste at specific times and places . . ." The simple fact that the plaintiff holds out the possibility that it may offer direct proof of alleged unlawful conduct negates the central thrust of the plaintiff's argument, *i.e.*, that the disputed discovery is not relevant to its claims.

The plaintiff reports in its Response that Cal-Maine did not attend a July 18 - 19, 2007, document production at ODAFF. That is correct, but the suggestion that Cal-Maine has not examined the grower records that were produced on that occasion is not correct. Cal-Maine has examined those grower records and has found no indication that ODAFF or the State of Oklahoma has prosecuted any administrative action or criminal action against any former Cal-Maine independent contract grower. To the contrary, those records indicate that the few deficiencies which were noted regarding the operations of any of those growers were remedied by those growers to the satisfaction of ODAFF.

It is clear, however, that neither the document production by ODAFF nor the examination of those documents by Cal-Maine answers the interrogatories. The interrogatories ask whether the plaintiff contends that any of the former Cal-Maine independent contract growers have stored or applied litter in an unlawful manner. The absence of any contention by the plaintiff that litter from Cal-Maine chickens was stored or spread unlawfully is highly probative to the asserted defense, and Cal-Maine is entitled to a straight-forward answer to that question. Instead of answering, the plaintiff has avoided the

question by arguing that (1) it does not matter whether or not it so contends, or (2) if the plaintiff later decides it does matter it will supplement its response. The answer does matter, of course, to the defense asserted by Cal-Maine. If the plaintiff does not contend that the identified growers have unlawfully stored or applied litter, then the plaintiff should be ordered to say plainly that it makes no such contention. If the plaintiff does so contend, then the plaintiff should be ordered to say so and respond to the remaining parts of those interrogatories.

The plaintiff's argument that it need not respond to discovery because the discovery does not take the plaintiff's view of this litigation is empty and contrary to the Federal Rules. The Court should order the plaintiff to immediately respond to interrogatories 1 and 2 and production requests 1 and 2.

Interrogatory 7 and Production Request 5

Interrogatory 7 and Production Request 5 relate to the matter of the Arkansas River Basis Compact and the Arkansas River Basis Compact Commission. The discovery is relevant to at least three of the defenses Cal-Maine asserted in its Answer to the First and Second Amended Complaints. The fourth defense raises the plaintiff's failure to join a necessary party; the seventh defense asserts that the plaintiff's claims are barred by the provisions of the Compact; and, the eighteenth defense raises the defense of primary jurisdiction.

In its Response the plaintiff argues that the discovery is not relevant and that responding would be burdensome. The plaintiff also argues that Cal-Maine has not explained why Arkansas may be a necessary party. That reason should be obvious. To the extent, if any, that poultry litter has a significant adverse impact on the IRW, this case is about nothing but money without the State of Arkansas as a defendant. If all the plaintiff

wants is money, then perhaps Arkansas is not necessary as a party. But, to the extent, if any, that this case is truly about the environment in the IRW, and to the extent, if any, that chicken litter (and chicken litter alone) truly has a significant adverse impact on the IRW, the plaintiff can not get complete relief unless Arkansas is made to conform its litter regulatory construct to Oklahoma's liking. The plaintiff has come close to admitting that it cannot show that the laws and regulations of Oklahoma and Arkansas have been violated on anything approaching a scale large enough to cause environmental damage. In other pleadings the plaintiff has referred to a vague notion of a "mass balance" approach apparently having as its central tenet the notion that there are simply too many chicken farms in the IRW. The number of chicken farms is, of course, subject to regulation. If the "problem" is not a widespread violation of the laws and regulations put in place by Oklahoma and Arkansas (and it is not), then the problem, if there is a problem with chicken litter, is one of insufficient regulation by the two sovereigns in whose domains the IRW is situated. In short, a paradoxical problem for the plaintiff's theory of liability in this litigation is not that too few people obey the laws; it is, instead, that too many people obey the laws. The plaintiff's theory in this lawsuit is that litter is the only meaningful source of alleged nutrient loading in the IRW. That is patently not true, but if the plaintiff is taken at its word the environmental component of this action can come to nothing without a change in the way both Oklahoma and Arkansas regulate litter. No change in the way Arkansas regulates litter can be accomplished unless Arkansas is a defendant.

Cal-Maine's contention, as set out in its Answers to the First and Second Amended Complaints, is that the proper way to bring Arkansas into the equation is through the Compact. The discovery is calculated to find out whether the plaintiff has any reason to believe that Arkansas cannot be trusted to fulfill its obligations under the Compact in the

event a remedy is sought and achieved in that forum. If the plaintiff cannot identify any instances in which Arkansas has failed to fulfill any obligations it has ever had under the Compact, then Cal-Maine's defense that the proper way to address the issues is through the Compact is strengthened. The discovery is plainly relevant to the Compact defense asserted by Cal-Maine. The discovery is proper.

The plaintiff pointed out that Arkansas's motion to intervene was denied. The primary basis for its motion was that Arkansas had a duty to protect its sovereign prerogatives relating to the regulation of chicken litter within the borders of the State of Arkansas. Also, Arkansas pointed out that in its view the litigation amounted to a water dispute which should have been brought through the Commission. The District Court denied the motion without a written Opinion. The denial of the motion should be viewed as a finding that so far as Arkansas is concerned the plaintiff can seek incomplete relief if it wants. The ruling hardly forecloses the reality that the Compact is a forum in which important issues in this action can and should be resolved, and that complete relief cannot be had without Arkansas as a defendant in that forum or this Court.

As stated above, the defenses raised by Cal-Maine will not be decided in this discovery motion. The defenses, however, have been raised, and the plaintiff is obligated to respond to discovery relating to the defenses. The plaintiff's objection that it would be burdensome to respond to the discovery is just nonsense. If Arkansas has failed to live up to any of its obligations under the Compact, Oklahoma is well aware of it. Answering the discovery is a very simple proposition. The plaintiff should be compelled to give direct answers to the discovery.

Interrogatories 8 and 9, and Production Requests 6 and 7

The last discovery items at issue relate to the possible adverse consequences to family farmers and the economies of Oklahoma and Arkansas if the issue of injunctive relief is reached. The plaintiff takes the astonishing and dismaying position that these matters are not relevant.

The plaintiff begins its argument by reminding the Court of its *ipse dixit* assertion that the public health is endangered by chicken litter. It is worth noting here that on June 15, 2006, the plaintiff responded to an interrogatory propounded to it by Simmons Foods, Inc. Simmons's interrogatory 5 asked the plaintiff to identify "persons who have suffered any adverse health effect as a result of water contact in the Illinois River Watershed which was caused by the land application of poultry litter." After more than a page of objections, the plaintiff's less than emphatic response was that it was "investigating reports of illness caused by the Defendants (sic) improper waste disposal activities." Over a year after suit was filed the plaintiff was not able to identify a single person who has suffered any adverse health effect traceable to chicken litter. In its response to the interrogatory the plaintiff reserved the right to supplement its response. There has been no supplementation.

The plaintiff points to several cases on the issue of injunctions and public health, but none provides authority for the proposition that the plaintiff's bare, questionable assertions of the existence of a public health hazard takes the issue of balancing equities off of the discovery table at the inception of the litigation. Each of the cited cases is a circuit court case. In each case, before it entered its injunction the district court had made a finding that a hazardous substances violation had occurred and that the public health was threatened. None of the cases holds that discovery regarding the balancing of equities is forbidden

merely because the plaintiff is a sovereign or because there has been a bare assertion of a public health hazard.

The first case cited by the plaintiff is Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331 (4th Cir. 1983). Lamphier dealt with industrial wastes, including highly flammable solvents, being buried or burned without any permit. *Id.*, at 334 - 35 An injunction was granted which merely required the defendant to "open up his property to state inspection at reasonable times." *id.*, at 338 The second case is Illinois v. City of Milwaukee, 599 F.2d 151 (7th Cir. 1979). In that case the district court made a finding that the City of Milwaukee was dumping sewerage directly into Lake Michigan. Even so, the Court of Appeals was much more circumspect in its consideration of the question of injunctive relief on behalf of a sovereign. It noted that "[i]f the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be . . ." *Id.*, at 166 (emphasis added) Further, the Court noted that "when the polluting activity is shown to endanger the public health, injunctive relief is generally appropriate." *Id.*, at 166 (emphasis added). The third case is EPA v. Environmental Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990). In that case the district court found that a landfill had allowed "a release of hazardous wastes which contaminated groundwater . . ." *Id.*, at 331 The Court of Appeals quoted language from City of Milwaukee, but the quotes were dicta. The Circuit Court pointed out that "the district court specifically undertook to balance the benefit to the public against the harm to the public in this case" before enjoining further operation of the landfill. *Id.*, at 332 The next case is U.S. v. Bethlehem Steel Corp., 38 F.3d 862 (7th Cir. 1994). The defendant was found by the district court, on summary judgment, to have injected an ammonia waste liquor into an underground disposal well in violation of its permits. The district court enjoined the defendant "to comply with its hazardous wastes obligations under

[two statutes]." *Id.*, at 864 The last case is U.S. v. Marine Shale Processors, 81 F.3d 1329 (5th Cir. 1996). In that case the defendant operated a hazardous waste recycling kiln, *id.*, 1334, for several years without a proper permit. *Id.*, at 1337 In its treatment of this case the plaintiff correctly noted that the Court of Appeals held that when a sovereign is a plaintiff the court "may rest an injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public." *Id.*, at 1359. (emphasis added only by Cal-Maine)

The plaintiff may or may not be able to prove that the public health is endangered by the traditional use of litter as an organic fertilizer. The burden on that point belongs to the plaintiff. The plaintiff's response to the Simmons interrogatory seems to indicate that the plaintiff is not making much headway on the issue. Regardless, if the plaintiff is able to get a judgment that litter is a public health hazard then the cases it has cited may mean something. In the meantime, the allegation of a public health hazard is bare, contested, and contrary to the experience of generations of people who have handled and used litter for agricultural purposes. The issue of whether there will ever be a determination that such a hazard exists is an open question. There is, however, no basis upon which to foreclose discovery calculated to explore the balancing of equities as this case goes forward.

The plaintiff's goes on to argue that a balancing of the equities is not required where the action complained of is willful. It cites Marine Shale Processors, *supra*, for this proposition also. Again, the allegation of willfulness and a determination of willfulness are different things. Until there has been a determination on the issue of willfulness, the issue of dispensing with a balancing of the equities does not arise. The plaintiff makes the statement that "the balancing of the equities element of the injunctive relief standard is irrelevant under the facts of this case." (Pltf's Response, p. 11) Cal-Maine is left to wonder exactly what facts the plaintiff is referring to. Regarding the issues of public health and willfulness there are no

facts. There is only an absence of facts coupled with allegations and denials. Until a determination is made upon facts proved at trial, the traditional four requisites for injunctive relief apply, and discovery related to them is proper.

Lastly, the plaintiff argues that the public interest is declared by statute. Regardless of the merits of this argument, no statutory violation has been proved against Cal-Maine or any other defendant. If the plaintiff ever meets its burdens of proof and wins a determination that the defendants have violated the public interest as declared by statutes, then the plaintiff's argument regarding dispensing with the balancing of the equities will at least be ripe for decision. In the meantime, Cal-Maine should be allowed to prepare its case by conducting discovery regarding the balancing of the equities.

Conclusion

For all the reasons set forth in the original motion and brief, and in this reply, Cal-Maine's motion should be granted, and the plaintiff should be ordered to give simple, direct answers to the simple discovery it struggles so to avoid.

Dated: August 18 , 2007

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